

United States
Circuit Court of Appeals
For the Ninth Circuit.

EMERY VALENTINE,

Plaintiff in Error,

vs.

CHARLES A. QUACKENBUSH, Doing Business
Under the Firm Name and Style of THE
JUNEAU CONSTRUCTION COMPANY,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Alaska, Division No. 1.

Filed

APR 24 1916

F. D. Monckton,
Clerk.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer	5
Assignment of Errors.....	70
Attorneys of Record, Names and Addresses of..	1
Bill of Exceptions.....	17
Bond on Writ of Error.....	77
Certificate of Clerk, U. S. District Court to Transcript of Record.....	81
Citation on Writ of Error.....	78
Complaint	2
Instructions of Court to Jury.....	61
Instructions to Jury Requested by Defendant..	60
Judgment	15
Names and Addresses of Attorneys of Record..	1
Order Approving and Allowing Bill of Excep- tions, etc.....	68
Petition for Writ of Error.....	69
Praeipce for Transcript of Record.....	80
Reply	11
TESTIMONY ON BEHALF OF PLAINTIFF:	
FORREST, GEORGE F..	58
Cross-examination	59

Index.	Page
TESTIMONY ON BEHALF OF PLAIN- TIF—Continued:	
MARSHALL, GEORGE R.....	55
Cross-examination	56
Redirect Examination	57
QUACKENBUSH, CHARLES A.....	18
Cross-examination	28
Redirect Examination	38
Recross-examination	41
TESTIMONY ON BEHALF OF DEFENDANT:	
VALENTINE EMERY.....	44
Cross-examination	51
Verdict	16
Writ of Error	75

[Names and Addresses of Attorneys of Record.]

In the District Court for the District of Alaska, Division No. One.

No. 1153-A.

EMERY VALENTINE,

Plaintiff in Error,

vs.

CHARLES A. QUACKENBUSH, Doing Business
Under the Firm Name and Style of the
JUNEAU CONSTRUCTION COMPANY,
Defendant in Error.

J. H. COBB, Juneau, Alaska,

Attorney for Plaintiff in Error.

SHACKLEFORD & BAYLESS and V. A. PAINE,
Juneau, Alaska,

Attorneys for Defendant in Error. [1*]

*In the District Court for the Territory of Alaska,
Division No. 1, at Juneau.*

No. 1153-A.

CHARLES A. QUACKENBUSH, Doing Business
Under the Firm Name and Style of the
JUNEAU CONSTRUCTION COMPANY,
Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

*Page-number appearing at foot of page of original certified Record.

Complaint.

Comes now the above-named plaintiff and for a cause of action against the above-named defendant complains and alleges as follows:

I.

That on or about the 1st day of April, 1913, the plaintiff, Charles A. Quackenbush, and one T. A. Bush, and one R. J. F. Mill were engaged together as a copartnership in doing a general contracting and building business under the firm name and style of the Juneau Construction Company and that since said date the plaintiff herein has continued to do business under the firm name and style of the Juneau Construction Company and that the said T. A. Bush and the said R. J. F. Mill have retired therefrom and assigned all of their rights to the plaintiff herein, and that the plaintiff has continued to do business under the firm name and style of the Juneau Construction Company and is the owner of all the assets, bills receivable and accounts of said Juneau Construction Company.

II.

That between the 1st day of April, 1913, and the 1st day of April, 1914, the said Juneau Construction Company, at the special instance and request of the defendant, furnished to the defendant all of the lumber, materials, supplies and labor used [1½] in the erection and remodeling of three certain buildings belonging to the defendant in the town of Juneau, Alaska, and that the cost of said lumber, materials, supplies and labor was \$27,931.59, and that the defendant herein agreed to pay to the said Juneau

Construction Company the cost of said lumber, materials, supplies and labor used in the erection, construction and remodeling of said buildings and further agreed to pay to the Juneau Construction Company in addition thereto ten per cent (10%) of the cost of said lumber, materials, supplies and labor used in the erection, construction and remodeling of said building in compensation for the services of the said Juneau Construction Company in superintending the erection, construction and remodeling of the said buildings, and that the said Juneau Construction Company did superintend the construction, erecting and remodeling of said buildings, and that there was due to the said Juneau Construction Company on account of the said lumber, material, supplies and labor used in the erection, construction and remodeling of said buildings and on account of superintending the construction, erection and remodeling of said buildings, 31,953.29.

III.

That no part of the said sum of 31,953.29 has been paid except the sum of 26,774.32 and that there is now due and owing of and from the defendant to the plaintiff the sum of 5,020.92 with interest thereon at the rate of eight per cent (8%) per annum from April 1, 1914; that plaintiff has heretofore delivered to the defendant a detailed statement of his account against the above-named defendants and has also delivered to the defendant all vouchers connected with all of the items of said account and has demanded of and from the said defendant the said sum of money but the defendant has failed, neglected and refused to pay

the same or any part thereof. [2]

WHEREFORE plaintiff prays judgment against the defendant for the sum of 5,020.92 with interest thereon at the rate of eight per cent (8%) per annum from April 1, 1914, together with his costs and disbursements herein laid out and expended.

SHACKLEFORD & BAYLESS,
V. A. PAINE,

Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

Charles A. Quackenbush, being first duly sworn, on oath deposes and says: I am the above-named plaintiff and have read the foregoing complaint, know the contents thereof and believe the same to be true.

CHAS. QUACKENBUSH.

Subscribed and sworn to before me this 29th day of August, 1914.

[Notarial Seal]

W. S. BAYLESS,
Notary Public for Alaska.

My commission expires Dec. 22, 1917.

Filed in the District Court, District of Alaska,
First Division. Aug. 31, 1914. J. W. Bell, Clerk.
By J. J. Clarke, Deputy.

[Endorsed]: Original No. 1153-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Charles A. Quackenbush, Doing Business Under the Firm Name and Style of Juneau Construction Company, Plaintiff, vs. Emery Valentine, Defendant. Complaint. Shackleford & Bayless, V. A. Paine, Attorneys for Plaintiff. Office, Juneau, Alaska. [3]

*In the District Court for Alaska, Division No. 1, at
Juneau.*

No. 1153-A.

CHAS. A. QUACKENBUSH, Doing Business
Under the Firm Name and Style of the
JUNEAU CONSTRUCTION CO.,
Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

Answer.

The above-named defendant, for answer to the complaint of the plaintiff, alleges:

I.

Referring to the 1st paragraph of said complaint, defendant denies that plaintiff has been doing business as the Juneau Construction Co., ever since April 1st, 1913, or for any longer period than about September 1st, 1913.

II.

Referring to the 2d and 3d paragraphs of said complaint defendant denies all and singular the allegations therein contained, except as hereinafter expressly admitted and alleged.

And for an affirmative defense and cross-complaint against the plaintiff's cause of action, defendant alleges:

I.

That in the month of April, 1913, the plaintiff and T. A. Bush, and R. J. F. Mill were copartners, en-

gaged in the business of superintending the construction of building in Juneau, Alaska.

II.

That on or about the 1st day of April, 1913, the defendant entered into a contract with the said plaintiff, Bush and Mill, under their partnership name of the Juneau Construction Company wherein and whereby the said Construction Co. undertook and agreed to superintend the erection of two certain buildings for defendant [4] in said town, according to plans then and there furnished said company by defendant, which buildings are the same as those mentioned in the complaint herein; that by the terms of said contract said company undertook to employ all needed labor at not to exceed the regular going wages in Juneau, and to purchase all needed material at the market price less the dealer's discount, which said company represented that it could and would obtain by virtue of the business in which it was engaged, and that said discount would more than equal the compensation stipulated for said company as hereinafter stated; that defendant should furnish the said company from time to time as needed and as the work progressed, the funds necessary to pay for said labor and material, and the said company agreed to keep an accurate account of all such moneys, and of all expenditures made therefrom and furnish the same to defendant accompanied by original vouchers therefor; and it was further stipulated that said company should have and receive upon the completion of said work, a sum equal to ten per cent of the total cost of the labor and material employed, bought and

paid for through it. That on or about November 1st, 1913, by a contract by and between plaintiff and defendant, plaintiff undertook the repairing and remodeling of a certain other building for defendant on the same terms and conditions as set forth in the first contract.

III.

That after the said company had entered upon the performance of its said contract the said Bush and Mill retired from said firm (the precise date of which is unknown to defendant), and by some arrangement between themselves (the precise nature of which is unknown to defendant) plaintiff assumed all the duties and liabilities of said firm but the defendant never at any time released said partnership or any member thereof from any obligation to him under said contract.

That between the 10th day of May, 1913, and the 15th day of January, 1914, both inclusive the defendant furnished the said company and plaintiff not only with the sum of \$25,932.37 shown and [5] admitted in the bill of particulars filed herein, but in addition thereto with the further sum of \$2,500.00 with which last-mentioned sum plaintiff has failed to credit defendant, and making a total of \$28,432.37 furnished and paid said company under said contract.

V.

That upon the completion of the said work under said contract plaintiff demanded of the defendant the payment of a further sum of *upwaeis* of \$6,000 for a balance alleged by plaintiff to be due him; that defendant was ready and willing to pay any balance

actually due, and has at all times been so ready and willing, but he requested plaintiff give him a full account with original vouchers of the moneys he had received from defendant so that a correct balance could be struck, but the plaintiff failed and refused so to do, but did furnish defendant with copies, or purported copies of various bills and pay-rolls but incapable of verification, but which showed a purported balance due the plaintiff of upwards of \$6,000: which sum defendant declined to pay, on the ground that the same was incorrect, contained many items wrongfully charged to the defendant, and was not accompanied by vouchers. The bill of particulars filed herein is a substantial copy of said pretended account, except that by the addition and subtraction of various items and changes in the amounts of others the purported or claimed balance has been reduced.

VI.

Referring to the bill of particulars filed herein defendant alleges that he is not liable for the items \$539.40 "plan for block" or for any sum whatsoever therefor, for that the defendant did not furnish any such plan, and is not entitled to any charge therefor.

VII.

Referring to said bill of particulars, *defendant* alleges that he is not liable for the item of \$561.72 for "10 per cent on sundry accounts," or for any sum whatsoever on said item; for that, the said sundry accounts therein referred to embrace the heating plant, installation of a lighting and telephone system, plumbing, and painting, [6] none of which was paid for by or through said construction company

or plaintiff, or done under its or his superintendence, or embraced in the said contract.

VIII.

Defendant further alleges upon information and belief, that the prices shown on the several accounts annexed to and contained in said bill of particulars, and the wages shown on the pay-rolls, are not the actual prices and wages paid by the plaintiff or said construction company, but in each instance represents a larger amount than was actually paid; but if the plaintiff or said construction company did pay the prices and wages therein shown, then defendant alleges that the amounts so paid were largely in excess of the amount for which said material could have been purchased, and said labor employed, and that plaintiff and the construction company wrongfully and intentionally increased the cost of said work for the purpose of increasing the compensation they were to receive.

Defendant further alleges that the material shown and charged to him in said bill of particulars is largely in excess of the material actually purchased and used by the said construction company and plaintiff in the prosecution of said work.

IX.

That defendant has no means of ascertaining and stating the true and correct account between the construction company and himself under said contract, for the reason that all the material was purchased, and all the labor employed through said construction company and plaintiff, but he believes and therefore alleges that upon a true and correct statement of such

account, including the compensation stipulated for the said construction company, a balance will be found in defendant's favor for a large sum.

Wherefore defendant prays that, 1st, a true account of the matters and things involved in said contract be taken and stated; 2d. That in taking said account defendant be credited with the sum of \$28,432.37, the actual sum furnished by him; 3d. That if upon a [7] balance being struck he is due and owing anything to the plaintiff he is ready to pay the same, so soon as it is ascertained; 4th. That if there is a balance due the defendant upon such balance being struck, that he have judgment therefor against the plaintiff; and 5th. For all costs and disbursements herein incurred; and for such further and other relief, both general and special, as the nature of the case may require, including the appointment of some suitable person skilled in accounting, to take and state the accounts between the plaintiff and defendant and strike a balance and report the same to the Court.

J. H. COBB,

Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

Emery Valentine, being first duly sworn, on oath deposes and says: I am the defendant above named. I have heard read the above and foregoing answer, and the same is true as I verily believe.

EMERY VALENTINE.

Subscribed and sworn to before me this Nov. 2d, 1914.

[Notarial Seal]

J. H. COBB,

Notary Public in and for Alaska.

My commission expires Nov. 9th, 1914.

Service of the above and foregoing answer admitted this October —, 1914.

Of Counsel for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Nov. 2, 1914. J. W. Bell, Clerk. By J. J. Clarke, Deputy. [8]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1153-A.

CHARLES A. QUACKENBUSH, Doing Business
Under the Firm Name and Style of the
JUNEAU CONSTRUCTION COMPANY,
Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

Reply.

Comes now the above-named plaintiff and replying to the Affirmative Defense and Cross-complaint set out in the answer of the defendant herein, admits, denies and alleges as follows:

I.

Referring to paragraph I of said Affirmative Defense and CrossComplaint the plaintiff admits the

allegations therein contained.

II.

Referring to paragraph II of said Affirmative Defense and Cross-Complaint, the plaintiff admits that on or about the 1st of April, 1913, the defendant entered into a contract with the plaintiff, Bush and Mill under their partnership name of the Juneau Construction Company, wherein and whereby the said Construction Company undertook and agreed to superintend the erection of two certain buildings for the defendant in said town; denies "according to the plans then and there furnished said company by defendant"; admits that by the terms of said contract the Juneau Construction Company undertook to [9] employ all needed labor at not to exceed the regular going wages in Juneau and to purchase all needed material at the market price less the dealer's discount which said company represented that it could and would obtain by virtue of the business in which it was engaged; denies that the plaintiff agreed that said discount would more than equal the compensation stipulated for the plaintiff as hereinafter stated; admits that it was agreed that the defendant should furnish the plaintiff from time to time as needed, and as the work progressed, funds necessary to pay for said labor and material and that said company agreed to keep an accurate account of all such moneys and all expenditures made therefrom and furnish the same to defendant accompanied by original vouchers therefor; admits that it was further stipulated that said company should have and receive upon the completion of said work a sum of money equal

to ten per cent of the total cost of the labor and material employed, bought, used and paid for by or through it or the defendant, and admits all the other allegations in said paragraph contained.

III.

Referring to paragraph III of said Affirmative Defense and Cross-Complaint, plaintiff admits that after the said company, the Juneau Construction Company, had entered upon the performance of its said contract that the said Bush and Mill retired from the firm and that the plaintiff assumed all of the duties and liabilities of the said firm; denies each and every other allegation therein contained and alleges the facts to be that the assumption by the plaintiff as the successor in interest of the said partnership of the obligations of the said contract with [10] the defendant was done with the full knowledge and consent of the defendant.

IV.

Referring to paragraphs IV, VI, VIII and IX of the said Affirmative Defense and Cross-complaint, the plaintiff denies each and every other allegation of fact therein contained.

V.

Referring to paragraph V of said Affirmative Defense and Cross-complaint, the plaintiff admits that upon the completion of the said work under the said contract, he demanded of the defendant the payment of a further sum of upwards of \$6,000 as and for a balance due him; admits that the defendant requested plaintiff to furnish him a full account, with the original vouchers, of the moneys he had received

from the defendant; admits that the same showed a balance due the plaintiff from the defendant of upwards of \$6,000 and denies each and every other allegation of fact therein contained.

VI.

Referring to paragraph VII of said Affirmative Defense and Cross-complaint, the plaintiff admits that none of the sundry accounts therein referred to were paid for or through the Juneau Construction Company or the plaintiff, but denies each and every other allegation of fact therein contained.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of \$6,051.55, with interest thereon at the rate of eight per cent per annum from April 1st, 1914, together with his costs and disbursements herein laid out and expended.

SHACKLEFORD & BAYLESS,

V. A. PAINE,

Attorneys for Plaintiff. [11]

United States of America,
District of Alaska,—ss.

I, Charles Quackenbush, being first duly sworn, on oath say: That I am the plaintiff in the above-entitled action; that I have read the foregoing Reply and know the contents thereof and believe the same to be true.

CHARLES A. QUACKENBUSH.

Subscribed and sworn to before me this 16th day of November, A. D. 1914.

[Notarial Seal]

W. S. BAYLESS,

Notary Public for Alaska.

My commission expires Dec. 22, 1917.

Due service of a copy of the within is admitted
this — day of —, 191—.

_____,
Attorney for _____.

Filed in the District Court, District of Alaska,
First Division. Nov. 16, 1914. J. W. Bell, Clerk.
By C. Z. Denny, Deputy.

[Endorsed]: Original No. 1153—A. In the Dis-
trict Court for the District of Alaska, Division No. 1,
at Juneau. Charles A. Quackenbush, etc., Plaintiff,
vs. Emery Valentine, Defendant. Reply. Shack-
leford & Bayless, Attorneys for Plaintiff. Office,
Juneau, Alaska. [12]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1153—A.

CHARLES A. QUACKENBUSH, Doing Business
Under the Firm Name and Style of the JU-
NEAU CONSTRUCTION COMPANY,
Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

Judgment.

This matter coming on for hearing before the
above-entitled court, and a jury on the 24th day of
February, 1915, the plaintiff being represented by
his attorneys, Messrs. Shackelford & Bayless and
V. A. Paine, and the defendant by his attorney, J. H.

Cobb, Esq., and both sides having submitted oral and documentary evidence and rested, and after the arguments of the respective counsel and instructions of the Court, and the jury having on the 2d day of March, 1915, filed their verdict herein, which is in words and figures as follows, to wit:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1148—A.

CHARLES A. QUACKENBUSH, Doing Business
Under the Firm Name and Style of the JU-
NEAU CONSTRUCTION COMPANY,
Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

Verdict.

We, the jury, duly empanelled and sworn in the above-entitled action, find for the plaintiff herein, in the sum of \$3,706.07, with interest from the 1st day of May, 1914, and [13] find that the plaintiff is entitled to recover of said defendant the said sum with interest.

(Signed) J. N. STEPHENSON,
Foreman.

And the defendant having filed on March 5th, a motion for a new trial, and the Court having denied the same;

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of and

from the defendant, the sum of \$3,706.07, with interest thereon at the rate of 8% per annum from the 1st day of May, 1914, to date, amounting to \$3,982,77/100, with interest thereon at the rate of 8% per annum until paid, together with its costs and disbursements to be taxed by the clerk of the court.

Done in open court, this 6th day of April, 1915.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal, No. K, page 286.

O. K. as to form except that defendant desires to be heard on question of costs.

COBB.

Filed in the District Court, District of Alaska, First Division. Apr. 6, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [14]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1153—A.

CHARLES A. QUACKENBUSH, Doing Business
as the JUNEAU CONSTRUCTION CO.,
Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the trial of the above-entitled and numbered cause, the following proceedings were held, to wit:

[**Testimony of Charles A. Quackenbush, in His Own
Behalf.**]

CHARLES A. QUACKENBUSH, being first duly sworn and having testified that the Juneau Construction Co. was originally composed of himself, a Mr. Mill and a Mr. Bush, and that said Mill and Bush withdrew from the firm about July, 1913, further testified as follows:

Q. Now, turning to page one of the bill of particulars Emery Valentine to Juneau Construction Company, with the total at the bottom—just state, in a general way, to the jury what that first page represents.

A. Well, the first page here is the material, transfer bills, pay rolls, freight bills, and so forth—in fact, a complete statement of the cost of the building.

Q. That is a summary of the itemized bills that follow? A. Yes, exactly.

The COURT.—Do I understand the witness is holding a copy [15*—1†] of your bill of particulars?

Mr. SHACKLEFORD.—Yes, sir.

Q. Now, on page 2, at the top of the page there are five accounts, marked “American Paint Company, Alaska Electric Light and Power Company, Juneau Iron Works, Marshall and Newman and Telephone Company”—what do those accounts represent?

A. The American Paint Company, \$800; the Alaska Electric Light and Power Company, \$550.50

*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

(Testimony of Charles A. Quackenbush.)

—that was done on straight day work, the same as the balance of the work; the Juneau Iron Works, \$2,972.50, was a contract for the heating which was let through the office of the Juneau Construction Company; the Juneau Construction Company furnished detail drawings and specifications, and figured out the radiation for each room, and everything; the bids were received and let through the office of the Juneau Construction Company.

Q. The bill of Marshall and Newman—what was that for?

A. That was for the plumbing; that was let the same way.

Q. The Telephone Company?

A. The Telephone Company was for wiring—roughing in for the telephone system.

Q. Those five bills on page 2 were not paid by the Juneau Construction Company?

A. No; they were not, for this reason: When Mr. Forrest's first payment was due for the plumbing, Mr. Valentine spoke about it and said he guessed Forrest was entitled to the payment—I don't remember the exact amount, though it was a thousand or fifteen hundred dollars—and he asked me if it was the same to me if he paid the bill, as it would be the same as if I paid it, and I said, "All right," and he said, "Very well, I will [16—2] give Forrest a check and get a receipt so you can get your percentage," which he did—I think it was \$1,500.

Q. Now, Mr. Quackenbush, all you are suing for on these five items is the ten per cent commission?

(Testimony of Charles A. Quackenbush.)

A. Just the commission to which we are entitled.

Q. When the Forrest bill was paid by Mr. Valentine, did he bring the receipts around and leave them with you? A. He gave me two.

Q. Are those the two which he gave you? (Handing papers to witness.)

A. Yes, sir.

Mr. SHACKLEFORD.—We will offer the two in evidence as Plaintiff's Exhibits Nos. 1 and 2.

Mr. COBB.—No objection.

The COURT.—Now, those are the receipts the Juneau Iron Works gave Mr. Valentine, and Mr. Valentine turned over to the Juneau Construction Company?

Mr. SHACKLEFORD.—Yes.

The COURT.—Very well.

(Whereupon said receipts were received in evidence and marked Plaintiff's Exhibits Nos. 1 and 2.)

Q. Now, the remainder of page 2, Mr. Quackenbush, what does that show?

A. That shows the cash credits of Mr. Valentine.

Q. Have you received anything other than the amounts set forth on page 2 from Mr. Valentine on this account? A. No, sir.

Q. Now, turn over to the next page—what does that represent? Is that a detailed statement of the account shown on page 1?

Mr. COBB.—I object—let the witness testify, don't let counsel state. [17—3]

Mr. SHACKLEFORD.—If counsel insists, I will

(Testimony of Charles A. Quackenbush.)

ask the witness that this represents—it is very evident.

A. It is a detailed statement—starts with material on the 23d of April—

Q. From whom?

A. Starts out with the Alaska Supply Company; in making up this, we have bunched the different supply houses to show all the goods from each house under one bill.

Q. Have you gone over this statement of the Alaska Supply Company? A. I have.

Q. Are all these items taken from bills delivered by you to Mr. Valentine, or not?

A. Every one of them.

Q. And have you traced the requisition numbers and the items therein, so as to find out whether that material actually went into the construction of the building? A. Yes, sir.

Q. Now, what have you to say as to that?

A. Why, this material was all on our requisition; when we first started the Construction Company it was quite a problem to get a book system; this material, as you will notice by the bill of particulars was all on our requisition numbers. For instance, if you wanted a thousand feet of lumber we made out a requisition for one thousand feet of lumber to the company, and then it had to be signed and marked with the job it went to; and then when this material was billed out at the end of the month, why, everything had to have the requisition number, and we paid no bills unless they had a requisition for it.

(Testimony of Charles A. Quackenbush.)

Q. So that by following the requisitions you could tell just where that particular item went to?
[18—4]

A. We could check it back from the bill they rendered and see where it went to that way.

Q. On every bill the requisition number would appear?
A. Yes, sir.

Q. Now, turning over to page 7 of the account, what is that?
A. C. W. Young Company.

Q. Is this made up in the same manner as the Alaska Supply Company bill?

A. Exactly the same.

Q. Have you made an investigation as to whether or not the items appearing on that bill went into the construction of the building that you were working on for Mr. Valentine?

A. Everything was carefully checked out; Mr. Valentine got a statement the first of every month after July.

Q. July of what year?

A. 1913; there was a couple of months the statements were not gotten out the first of the month; Mr. Valentine didn't care about it, and when I insisted upon his checking it he always put me off, didn't have time, never could get him into the office to look at the bills; he had a statement every month of these statements, and I spent lots of time before they left the office—we always kept a bookkeeper and I went over every statement every month before it left the office.

Q. Now, just state to the Court and jury whether

(Testimony of Charles A. Quackenbush.)

this material that went into the construction was purchased by the Juneau Construction Company direct for the concern, or whether it was purchased by Mr. Valentine?

A. Whether it was purchased for us, this material?

Q. I mean whether it was purchased on Mr. Valentine's [19—5] credit or the credit of the Juneau Construction Company?

A. Every dollar's worth that went in here was charged to the Juneau Construction Company and bought on the Juneau Construction Company's credit—both out of town and in town.

Q. With reference to the items of the C. W. Young & Company's bill on pages 7, 8 and 9, above the total marked \$1,243.72, what have you to say as to where those supplies went?

A. Well, now, take the Young Company's bill here, it starts out April 26th—

Q. I mean with reference to the three buildings that you were working on?

A. Yes, it went on the two buildings. For instance, April 26th, there, the first item there would go into the building known as the Arctic pool hall on Front Street.

Q. Just tell the jury what three buildings you were engaged in?

Mr. COBB.—I object to that; they first start in with two buildings and now they bring in the third.

Mr. SHACKLEFORD.—One was a repair job.

The COURT.—Objection is overruled.

Mr. COBB.—To which we except.

(Testimony of Charles A. Quackenbush.)

Q. Now, just explain to the jury what the three buildings were, and the order in which the work came up?

A. The first building was the building in which the Arctic Pool Parlor is now, on Front Street; that started in April.

Q. April, 1913?

A. April, 1913. The second one was the Valentine Block, [20—6] on the corner of Front and Seward, the Valentine Block there; that was a new block, and also included lowering the old block that was there; we lowered that something like a foot and put a new foundation under it; and the third one was the old jewelry store where Mr. Valentine was before he moved into the new place; we remodeled it and fixed it up for a pool hall.

Q. I understand the first building was what?

A. The first building was the building where the Arctic pool hall is on Front Street.

Q. Is that next to the Valentine Jewelry store?

A. No, Front and Franklin Streets, where they intersect there.

Q. The second building was the Valentine Building?

A. Yes; and the third one was the old jewelry store that Mr. Valentine moved out of.

Q. In addition to erecting the Valentine building, did the Juneau Construction Company have anything to do with wrecking the previous buildings on that lot?

A. Yes; the first buildings there—it was all cov-

(Testimony of Charles A. Quackenbush.)

ered with shacks; we tore down the old shacks there, and turned that building over to the tenant in something like 35 days, I think, two stories and plastered.

Q. You proceeded and built that building. What, if anything did you have to do with reference to rapid work on Front street there?

A. Well, that was a case of, I guess, stealing a little ground from the city, or something like that—a few feet of ground in front there; we started the job Saturday evening—

Mr. COBB.—I object to that as incompetent, irrelevant and immaterial. [21—7]

Mr. SHACKLEFORD.—I want to show the nature of the work and the speed he had to use with it.

The COURT.—Speed doesn't make any difference; he doesn't get anything extra for speed.

The WITNESS.—Your Honor, the cost would be more.

The COURT.—Whatever the cost was, if your contract calls for it, you are entitled to it.

Q. Mr. Quackenbush, what is this—I will show you this bundle of plats?

A. Why that is the drawing that we made for the Valentine block.

Q. Something was said in the opening statement about Mr. Valentine having furnished you with those plans; just state what the facts are in regard to that.

A. These plans were made under Mr. Valentine's orders and direction; Mr. Valentine did have an old sketch that he brought over there but it wasn't any-

(Testimony of Charles A. Quackenbush.)

thing that he wanted—he gave us the job—this was the first estimate we made, was for the plans before he gave us the work on the building.

Mr. COBB.—I shall object to testimony on that line, your Honor. In accordance with the opening statement of counsel they were, in addition to the ten per cent, to have 2½ per cent for the plans; it isn't within the issues of the case.

Q. Mr. Quackenbush, what if anything, was done by the Juneau Construction Company with reference to making the plans for the building?

A. Well, we have here the plans of the Valentine block; this is the cloth tracing of the blue-prints which were made for the building.

Q. Who was that made by? [22—8]

A. This was made by the Juneau Construction Company; we employed an architect from Seattle.

Q. At Mr. Valentine's request?

A. Yes, sir; of course, we had the architect working on this for a great many days, as the work will show for itself to anyone familiar with it.

Q. Did you have any conversation with Mr. Valentine as to how this work was to be paid for?

A. It was distinctly agreed upon that 2½ per cent was to be the cost of the plans, which is very reasonable for architectural work.

Mr. COBB.—Repeat that, I didn't get it.

A. It was agreed that 2½ per cent was to be paid for the plans.

Mr. COBB.—I object to that and ask that it be stricken.

(Testimony of Charles A. Quackenbush.)

Q. Those are the plans in accordance with which the building was constructed? A. Yes, sir.

Q. Any other plans that were used in the construction of the building? A. No, sir.

Mr. COBB.—All the testimony in regard to the plans and the agreement to pay $2\frac{1}{2}$ per cent of the cost *us* moved to be stricken.

The COURT.—Motion will be denied.

Mr. COBB.—To which we except.

Q. Now, turning back to page one, at the bottom of the page there, Mr. Quackenbush; there is an item "Plans for block, \$666.82"; is that an item made out upon a $2\frac{1}{2}$ per cent calculation on the total cost of the block? A. What page?

Q. Page 1, after the total debits and the total credits, [23—9] \$666.82—is that $2\frac{1}{2}$ per cent of the total cost of that particular block? A. Yes, sir.

Q. Now, what was the total amount of the bills for labor and materials which were actually purchased by the Juneau Construction Company for this work, outside of your commission and plans for the block—indebtedness incurred by you?

A. \$27,931.59; that is material and pay-rolls.

Mr. COBB.—As I understand, that represents labor and materials?

A. Yes, sir.

Q. Now, in addition to that, turn to page 2, the five items of bills paid by Mr. Valentine direct?

A. Yes, sir; Mr. Valentine paid those direct.

Q. \$5,617.20? A. Yes, sir.

Q. And you make no claim except the commission on them?

(Testimony of Charles A. Quackenbush.)

A. Just the commission, which is customary in every place in the United States where I ever done business.

Q. It is understood those five items at the top of page 2, American Paint Company, Alaska Electric Light and Power Company, Juneau Iron Works, Marshall and Newman and the Telephone Company, are what are called sundry accounts, upon which a ten per cent commission is charged on page 1; so that in addition to the actual indebtedness incurred by the Juneau Construction Company for labor and materials you have charged the further sum of 10 per cent of the cost of the building, amounting to \$2,793.16?

A. Yes, sir.

Q. For commission on the sum above mentioned—

A. Yes, sir. [24—10]

Q. And 10 per cent on the Sundry Accounts paid by Mr. Valentine? A. Yes, sir.

Q. And \$666.82 for the plans of the blocks?

A. Yes, sir.

Cross-examination.

(By Mr. COBB.)

Q. Mr. Quackenbush, the Juneau Construction Company you say, first consisted of Mr. Mill, Mr. Bush and yourself? A. Yes, sir.

Q. Sometime in July, 1913, did you have any conversation at all with Mr. Valentine personally regarding this contract, at the time it was made?

A. At the time it was made?

Q. Yes.

A. Not right at the time; later on, though, at different times.

(Testimony of Charles A. Quackenbush.)

Q. Now, as a matter of fact all the conversation Mr. Valentine had with the Juneau Construction Company was with Mr. Mill, was it not?

A. The first agreement, but I talked it over with Mr. Valentine a month later—two weeks later, and after that several times.

Q. You talked it over with him? A. Yes, sir.

Q. The agreement, however, was made by Mr. Mill? A. Yes, sir.

Q. Did Mr. Valentine ever state to you the terms of the agreement he made with Mr. Mill?

A. Yes, sir.

Q. When was that? [25—11]

A. At different times we have talked about it; I don't remember the exact dates.

Q. Can't you approximate it? Let us try to get it a little more definite.

A. Pretty hard to fix dates; I expect maybe a month after Mr. Mills first made the agreement with him.

Q. Well, about what was the date of the agreement, do you know? A. It was about April.

Q. What time in April?

A. I couldn't tell you exactly, Mr. Cobb, without looking at the records.

Q. You claim then that you had a conversation with Mr. Valentine some time in May?

The COURT.—April of what year, Mr. Quackenbush? A. 1913.

Q. You claim then that you had a conversation with Mr. Valentine some time in May, 1913, in which

(Testimony of Charles A. Quackenbush.)

he stated to you the terms of the contract he had made with the Juneau Construction Company—with Mr. Mill? A. Yes, sir.

Q. Where was that conversation?

A. In the jewelry store—the old jewelry store.

Q. Who was present?

A. No one only Mr. Valentine.

Q. What was the occasion of his telling you what the contract was?

A. Well, he was just talking over business matters, telling me how well pleased he was so far; we talked it over at that time, when the whole thing come out.

Q. Now, I just want you to tell the jury what he told you at that time was the contract he had made with Mr. Mill.

A. Well, in regard to the balance, he said that he was [26—12] satisfied about the 21½ per cent for plans if he had a good plan—he wanted a good plan; he had been buncoed on two sets of plans, and he hoped he would get a good set this time; that was about the words that he used in regard to the plans.

Q. You are positive he told you that?

A. Yes, sir.

Q. Did he say anything else about any other terms of the contract?

A. Well, it was talked over about the work; I don't remember the exact words; we wasn't making any terms nor nothing—just talking over different matters.

Q. That is the best you can answer?

A. Why, I can't think of the exact words that Mr.

(Testimony of Charles A. Quackenbush.)

Valentine used—not the exact words.

Q. Did he ever tell you that he was going to pay ten per cent on the total cost of the building?

A. Certainly did.

Q. When?

A. Why, at different times; I don't know as he ever said so; it was talked over as a matter of fact, and I know that had been understood.

Q. Now, Mr. Quackenbush, if you are telling the jury the facts about that, when you drew your complaint herein why didn't you sue for $12\frac{1}{2}$ per cent of the total cost of the building, under your alleged contract?

A. Because I was entitled to ten per cent of the total cost of the building.

Q. And $2\frac{1}{2}$ per cent, you say, for the plans?

A. Yes, sir.

Q. That makes $12\frac{1}{2}$ per cent, doesn't it?

A. Yes, sir.

Q. Why didn't you sue for that? [27—13]

A. Well, it makes a little different balance, I think. That ten per cent, that is for superintendence, and I am entitled to ten per cent for superintendence on every bit of work that I done and material furnished; and the $2\frac{1}{2}$ per cent is much less than my other commission.

Q. You are charging $2\frac{1}{2}$ per cent in addition, then, to the ten per cent you are charging on the work done and material furnished?

A. I am asking for $2\frac{1}{2}$ per cent of the total cost of the Valentine building, not the old building.

(Testimony of Charles A. Quackenbush.)

Q. Answer the question—you are also charging 21½ per cent in addition then to the 10 per cent?

A. Certainly—regular architect's fees.

Q. So in addition to the ten per cent of the total cost of the building so far as labor and material is concerned, you are charging Mr. Valentine 21½ per cent on your commission of ten per cent and adding it to the other, is that right?

A. That is for separate services altogether.

Q. Answer the question—is that what you are doing?

A. I charged Mr. Valentine, as I stated before, 21½ per cent for the plans of the Valentine block, and I am asking 10 per cent commission on the total work done.

Q. Does that ten per cent—the amount you calculate your 10 per cent on, include the cost of the plans?

A. It does not.

Q. Does the 21½ per cent you calculate for architect's plans, include your commission on the building?

A. Does it include—

Q. It is calculated on your 10 per cent commission as well as the other cost?

A. Certainly not. [28—14]

Q. What is it calculated upon?

A. It is calculated on the net cost of the building, which is customary in architect's fees.

Q. Customary?

A. The world over, any place I have been.

Q. What do you tell the jury is the net cost, as you call it, of the Valentine Block?

(Testimony of Charles A. Quackenbush.)

A. The total cost of the block is \$26,673.30.

Q. \$26,673.30? A. Yes, sir.

Q. That, you tell the jury, is the cost of the Valentine Building upon which you charge this 21½ per cent commission? A. Yes, sir.

Q. Now, in going through this account that you swore to here, did you attend to the addition of the figures? A. You mean the clerical work?

Q. Additions and totals.

A. Not altogether—I merely checked it over, and the material bills.

The COURT.—Are you now speaking of the bill of particulars attached to the complaint?

Mr. COBB.—Yes, a copy of which he has been testifying to.

Q. Did you go through and verify the totals that were carried down? A. I didn't add them up.

Q. You don't know whether there is any error in those totals or not?

A. There might be a little discrepancy—clerical error, there.

Q. And the totals you testified to as being correct, you don't know whether there are any errors in the totals, or not? [29—15]

A. They are correct as far as I know, subject to little clerical errors,—there is a mass of work there.

Q. Do you know of any?

A. No, only what have been corrected.

Q. You know of none except that have been corrected. Now, there is one matter I want to explain to the jury and see what your ideas are about it. In

(Testimony of Charles A. Quackenbush.)

the statement which you say you first gave to Mr. Valentine you put in your plans at \$541, where did you get that amount from?

A. Well, we had a little different total there from what we had here; there has been a couple of errors found and corrections made; it was figured always from the total cost of the building—the net cost of the building.

Q. Well, the difference between \$541 and \$666 is something over \$125, isn't it? A. I think so.

Q. Now, from where did you get the increased cost of the building to make this $2\frac{1}{2}$ per cent of the increased cost reach \$125 last April?

A. I have got the figures here where I got it from.

Q. Where did you get the increased cost from?

A. Well, you see there was corrections—Mr. Valentine never claimed any errors until he come to court.

Q. I wish you would answer the question and not keep telling me about what Mr. Valentine has been doing or saying. Where did you get that increased cost from to make your $2\frac{1}{2}$ per cent on it run up to \$125.? A. On corrections of the statements.

Q. \$125 is $2\frac{1}{2}$ per cent of \$5,000, isn't it—can you answer that question?

A. No, I cannot tell you examtly, Mr. Cobb. [30—16]

Q. Well, we will assume that \$125 is $2\frac{1}{2}$ per cent of \$5,000—I think the jury can all tell in a minute that is correct. Where did the increase of \$5,000 in this building come from from the time you first pre-

(Testimony of Charles A. Quackenbush.)

sented your bill to Mr. Valentine to the time you are now talking about?

A. In the first place, these sundry accounts wasn't added in.

Q. Then as a matter of fact there was no increase cost in the building discovered, was there?

A. No; I think there was a correction made in the plans so the cost decreased a little bit.

Q. Then why did you increase your $2\frac{1}{2}$ per cent by \$125?

A. Well, it was simply an error in the office.

Q. It was what? A. It was a mistake.

Q. And on your second account that you presented when you claimed a balance of \$6,051, you put in your plans then at \$539.40, didn't you? A. I think so.

Q. That is after you had time to go over it again and you reduced it a little—what did you figure it on that time?

A. Mr. Cobb, this bill of particulars is too lengthy, and there has been so much time spent on it; I couldn't tell every little thing like that—the errors and things that have been found; if I had the bills and vouchers I suppose then I might tell something about it.

Q. You can tell the jury if you know what you figured it on?

A. It is a part of the vouchers here, I suppose; I cannot tell you everything there was. [31—17]

Q. All right; if you don't know we will pass on them, but you art now claiming \$666?

A. Yes, sir.

(Testimony of Charles A. Quackenbush.)

Q. Who drew those plans?

A. An architect by the name of Josenhaus.

Q. Did you see him draw them?

A. Yes, most of it.

Q. When did he draw them?

A. He was working on the plans two or three months, off and on. Q. About when?

A. From about the time we first made the contract; he worked on the details until the building was finished.

Q. Mr. Quackenbush, you paid the bills and pay-rolls that are shown on page 1 of the bill of particulars for the company, did you not—the total of those bills there aggregating, as you claim, \$27,931.59; you contracted those, that is, and paid them, did you?

A. Yes sir.

Q. Did you pay the bill of the American Paint Company? A. No, sir.

Q. Did you pay the bill of the Alaska Electric Light and Power Company?

A. No, sir; no; part of it only.

Q. The entire bill that is shown on page 2?

A. No, I don't think so.

Q. You didn't pay any of that. Did you pay any of the Juneau Iron Works' bill? A. No, sir.

Q. Any of the Newman and Marshall bill?

A. No, sir.

Q. Any of the telephone bill?

A. No. [32—18]

Q. Why didn't you pay those?

A. Mr. Valentine asked me if it was agreeable for

(Testimony of Charles A. Quackenbush.)

him to pay them so long as I got my commission on them.

Q. When did he ask you if it was agreeable for him to pay them?

A. When the first payment was made to the Juneau Iron Works.

Q. When was that?

A. I don't know the dates; I think about September.

Q. You think it was about September?

A. When the roughing in was done for the heating.

Q. You mean to tell the jury that Mr. Valentine asked you on that occasion if it would be agreeable for him to pay them? A. Yes, sir.

Q. Whereabouts did that occur?

A. In Mr. Valentine's office.

Q. Who was there?

A. Mr. Valentine and myself.

Q. Anyone else? A. I don't think so.

Q. On this occasion he asked you if it was agreeable to you for him to pay these bills?

A. Yes, sir.

Q. I suppose you consented? A. Yes.

Q. You testified on yesterday about some man working on these plans from before they began the building until about the time it was through with—is that correct—take him that long to finish them?

A. Off and on; there was some of the details that wasn't required until the work caught up—minor details.

(Testimony of Charles A. Quackenbush.)

Q. When did he have the blue-prints made?
[33—19]

A. For the building?

Q. Yes.

A. The blue-prints for the main building was gotten out—I think the blue-print for the foundation was gotten out first.

Q. Well, when were they completed?

A. Well, real early; I don't remember the exact date; in time to start the work.

Q. Who was this man that worked on them?

A. Josenhaus.

Q. And he worked in the shop?

A. He done all the work in the office.

Q. Down at your shop?

A. No, sir; my office was then in Mr. Forrest's building.

Q. In the old Juneau Iron Works' building?

A. Yes.

Redirect Examination.

Q. Where is Mr. Josenhaus from? A. Seattle.

Q. What is his regular occupation?

A. He is an architect; he has been, I think, for twenty years in Seattle.

Q. What is his standing down there, do you know?

A. His standing is the very best; he is now building inspector for the city of Seattle.

Q. About how long was he working on this job?

A. He was working off and on there for about three months—not continually, you know; as the

(Testimony of Charles A. Quackenbush.)

plans were needed; we had considerable other work for him.

Q. In your statements made from time to time prior to this bill of particulars which you furnished, did you ever fail to charge the ten per cent to him?

A. Never did; no, sir. [34—20]

Q. Each month as you made up a statement, the ten per cent was added to the items which you rendered in those monthly bills? A. Always.

Q. Were those bills paid in full by Mr. Valentine?

A. I don't think there was ever a bill paid in full; the fore part of the construction work, the first two or three payments that Mr. Valentine made, I would ask for a thousand dollars, or \$1,500, or two thousand and get it and that was all there was to it. I had begun to render statements every month, and if the bill was for \$1,300, or something like that,—I don't remember the exact amounts—he would give me a thousand, or something like that; toward the last *be* begun to pay a little, five hundred or a thousand, until it accumulated quite a balance.

Q. Now, Mr. Quackenbush, you stated in your examination yesterday by Mr. Cobb something about the man who—originally discussed this contract with Mr. Valentine— was there ever any written contract?

A. Never was a written contract; in fact, I never had a written contract on a percentage job.

Q. Who was the man who first discussed the deal with Mr. Valentine?

A. The man who really made the deal with Mr.

(Testimony of Charles A. Quackenbush.)

Valentine was Mr. Mill.

Q. Where is he?

A. Mr. Mill is dead now—died about a month ago.

Q. Has he been living here?

A. He did live here; he left here, I believe, four or five months ago.

Q. As the work progressed, the terms of this contract were discussed between you and Mr. Valentine in making [35—21] up your statements?

A. It has come up in different ways so many times that I never dreamed of any dispute over it. One little instance—I had some men put in the sidewalk door out in the cement sidewalk there, and the plans showed the door running crossways of the sidewalk, like they always do, but when the door is open it blocks the way—they cannot walk through, and I put the door the other way, and Mr. Valentine made quite a fuss over it and says: “How do the plans show?” The plans did show the other way—he said, “I want it according to the plans”; said, “What am I paying for those plans for”? I never expected any dispute over the plans—it was thoroughly understood.

Q. Never been any dispute over the ten per cent?

A. Never any dispute.

Q. And until this suit was brought there was no dispute about the prices or the dealer's discount?

A. Not whatsoever; no, sir.

Q. No difference of opinion at any time prior to this suit expressed between you and Mr. Valentine as to the terms of the contract?

(Testimony of Charles A. Quackenbush.)

A. None whatever—not at all.

Recross-examination.

Q. When was the first time that you ever made a claim on Mr. Valentine to pay for these plans?

A. Well, when the building was completed.

Q. When was that?

A. I don't remember the exact date; the final statement will show; I wasn't entitled to it until the building was completed. [36—22]

Q. Now, when did you complete the building down at the corner of Franklin and Front?

A. Why, I don't remember the exact date, but about the first of June, as near as I can remember—somewheres about there.

Q. What was the cost of the work you did down there? A. Why, it was something over \$6,000.

Q. What is that?

A. Something over \$6,000; I don't recollect the amount.

Q. Does that include your commission?

A. Yes, sir.

Q. Could you give that exactly?

A. I think Mr. Paine could give it to you there.

Mr. PAINE.—\$6,355.30.

Q. Now, that includes your commission on it, does it not? A. Yes, sir.

Q. Is that correct? A. I think so.

Q. How much work on the Valentine store—the repair of that? A. The jewelry store?

Q. Yes.

Mr. PAINE.—\$520.19.

(Testimony of Charles A. Quackenbush.)

Q. That included your commission?

A. Yes, sir.

Q. That makes \$6,875.49. Now, what was the total cost, exclusive of your commission, of the Valentine Block? A. \$33,548.00—total cost.

Q. Yes.

A. \$33,548.

Q. \$33,000?

A. That was including the sundry accounts and everything.

Q. I am talking about your work. [37—23]

A. My work?

Q. Yes; what you expended.

A. \$27,931.59.

Q. Then, you claim that you paid out on the three buildings \$34,807?

A. \$33,548, ain't it, Mr. Cobb? Myself you mean?

Q. You said you spent \$27,931.59 on the Valentine block?

A. Yes, sir; and the cost of the Arctic block was \$6,455—I think that included the commission—and the jewelry store \$520.19, including the commission.

Q. Now, what was the Valentine block, including the commission? A. \$27,931.59.

Q. Well, can you give it to me exclusive of your commission?

A. Take the commission off of there?

Q. I don't want to confuse you, Mr. Quackenbush. You have charged there for the total work, including your commissions and everything—you have got the entire amount of work that you have done, in-

(Testimony of Charles A. Quackenbush.)

cluding your claim for 12½ per cent on the Valentine building, and the 10 per cent on the others, and the money that you paid out altogether you say amounts to \$31,953.29, less the sums that you concede you are mistaken about. Now, assuming that you are correct, how much did the Valentine block cost?

A. You mean without the commission?

Q. Yes.

A. \$29,003, I think.

Q. That would make more than \$38,000.00 on your whole bill. A. \$29,633.00.

Q. Aren't you mistaken about that?

A. I don't think so. [38—24]

Q. Twenty-six thousand?

A. You mean the material and pay-roll, exclusive of the commission or sundry accounts?

Q. Yes, sir.

A. \$26,673.30.

Q. Well, now, add your \$6,875.49 to that and see how much you have. You have a larger sum than you claim—you must be in error about that.

The COURT.—Mr. Cobb, you want to find out how much the Valentine block cost exclusive of his commission?

Mr. COBB.—Exclusive of his commission.

The COURT.—Including the plans?

Mr. COBB.—No; I want to find out, if I can, what he is basing his calculation of these plans on.

The COURT.—Now, you want to find out what the cost of the Valentine block was, exclusive of commission, exclusive of plans and also exclusive of sundry items?

(Testimony of Charles A. Quackenbush.)

Mr. COBB.—Yes.

The COURT.—You want to find out, as I understand it, what the Valentine block cost exclusive of his commissions, exclusive of the cost of the plans and exclusive of these items here that are called sundry items?

Mr. COBB.—Yes.

The COURT.—How long will it take you to calculate that, Mr. Quackenbush?

A. Just a second, Your Honor. Well, that is correct, Mr. Cobb; \$26,673.30 is what I based the claim on for the 2½ per cent—no, that includes sundry accounts though.

Q. That includes the sundry accounts that Mr. Valentine paid? A. Yes, sir.

Q. That you had nothing to do with. Now, what was the [39—25] amount of those?

A. That was \$5,617.20—\$21,056.30.

Q. That is money that you spent on the building?

A. Yes, sir.

Q. Including the labor and everything; and for the expenditure of that money and the superintendence of the work of that man, you want this jury to give you in addition to 10 per cent, \$666 more for plans?

A. For the architectural work; yes, sir.

[Testimony of Emery Valentine, in His Own Behalf.]

EMERY VALENTINE, defendant, testified in his own behalf as follows:

Q. Did you become acquainted with the Juneau Construction Company in the latter part of the year 1913?

(Testimony of Emery Valentine.)

A. About in April, I think, of that year.

Q. Do you know who composed the company at that time? A. Yes.

Q. Who were they?

A. Mr. Mill, Mr. Quackenbush and Mr. Bush.

Q. Mr. R. J. F. Mill? A. Yes, that is the one.

Q. Tom Bush and the plaintiff in this case?

A. Yes, sir.

Q. About that time did you have any business with the concern? A. Yes, sir; I did.

Q. With which member of the copartnership did you deal? A. With Mr. Mill.

Q. Now, I want you to state to the jury what was the nature of your dealings with Mr. Mill representing the Juneau Construction Company.

A. I first employed him to build a place for me known now as the Arctic Hotel and billiard room; that is the junction [40—26] of Front and Franklin *Street*. I believe I engaged him to do that job first, and when that was about through, why then I entered into an agreement with him to put up the building at the corner of Seward and Front.

Q. What is known as the Valentine building now, in which your jewelry store is? A. Yes.

Q. And did you engage him to do any repairing of other buildings? A. Engage him?

Q. The Construction Company.

A. Engaged Quackenbush afterwards along in the fall.

Q. After Mr. Mill withdrew from the firm. Now, tell the jury the terms of the contract or agreement

(Testimony of Emery Valentine.)

in regard to these two buildings.

Mr. SHACKLEFORD.—We object to that as calling for a conclusion of the witness—let him state what was said.

The COURT.—It is admitted in the pleadings that there was a contract.

Mr. COBB.—I will just limit it to these particular accounts and we will get along more rapidly.

Q. In the course of your making this contract with them, was anything said about the plans on which the building was to be constructed?

A. About the plans?

Q. Yes, of the Valentine building?

A. Yes; that was my first talk with Mr. Mill.

Q. Now, what was said in regard to it?

A. He said; “We will draw the plans for your building—plans and specifications; we will furnish them to you for 2½ per cent”; he said, “If you will give us [41—27] the job of putting up the whole building, why, we will furnish the plans and specifications and we will purchase the materials we use and superintend the construction for 10 per cent.”

Q. Did you have any plans in view at that time?

A. I had two sets that had been previously drawn by others.

Q. Did you furnish him those plans?

A. Yes, sir; he took those plans and I never got them back.

Q. Was the contract for the erection of this building that you finally entered into with Mr. Mills in accordance with those plans you furnished?

(Testimony of Emery Valentine.)

Mr. SHACKLEFORD.—We object to that as leading; let him state what was said.

The COURT.—Yes; let him state what was said.

Q. State what was said then, in regard to the building and the compensation.

A. And altering the plans I brought to them and furnished them?

Q. Yes.

A. Well, there were some minor changes to be made; for instance, the room for the furnace was about twice as large as it should be, and we reduced that; the plan of the front door there at my place was directly in the corner, and we moved that to another place; and the Mecca Saloon there, there was a concrete floor put in the toilet-room of the Mecca Saloon that wasn't in my plans that I furnished them.

Q. Was that about all the changes made?

A. That was about all the changes made.

Q. Now, the building—I will ask you, with the exception of these changes, the building was put up in accordance with the plans you already had?

A. Yes; just excepting those few little changes.
[42—28]

Q. What was the agreement, if any, as to the compensation the Juneau Construction Company should have for its work on this building?

A. Why, they should furnish all the plans, or the corrections anyway, on the plans I had—were to furnish those plans and specifications for that building, purchase material such as they used upon it, pay for the labor that they employed on it, and for all that

(Testimony of Emery Valentine.)

they were to have ten per cent.

Q. Of the total cost?

A. No, not the total cost of the building; of what they paid out.

Q. Now, was there anything said in regard to subsidiary contracts, such as the heating plant, and *so*? I will ask you, first, before reaching that if these plans provided for the heating?

A. One set—drawn by Mr. Shroeder—did.

Q. Was anything said between you and Mr. Mill especially regarding the subcontracts?

A. Yes—yes, sir.

Q. Tell the jury what that was.

A. Now, I told him, “You are to draw these plans complete”—he was to figure out there the number of feet of radiation, and so on, and I said, “I will have that put in myself,” and I said, “those subcontracts, those you are not to include in your charges.” “No, no,” he said, “what we do is what we will charge you for.”

Q. Did you ever have any conversation with Mr. Quackenbush at all in regard to this contract?

A. Never a word with him. One day I went down to his office; that was the first time, I believe, I saw the man. I asked him about the plate glass for the front, [43—29] and this man talked up big and said that the plate glass would be set in for \$71 a sheet, and he could get concrete for \$2.15 a barrel, and said, “We can save you a great deal more than all of our commissions in the way of discounts; we can buy things for you and save you the discount.”

(Testimony of Emery Valentine.)

That is the only conversation I have with that man until about the time Bush went into the interior and Mill went below and the partnership dissolved; and those are the only two times that I ever talked to that man about anything.

Q. You heard his testimony on the stand that you stated in the door of your store what the contract was—did you ever have such a conversation with him?

A. No, sir; I had no such conversation with him.

Q. When Mr. Mill withdrew from it, the plaintiff, Mr. Quackenbush, did attempt to carry out the construction of the building and finish it up?

A. Yes, he came to me about that time.

Q. State to the jury what occurred then.

A. He came to me and said that Tom was going into the interior and Mill was sick and he had bought them out, and he said, "Will it be all right if I go ahead and carry out this job?" And I said, "Oh, of course that will be all right; I want to get it done as soon as we can"; and he said, "All right; we will *lit* into it and do it all"—that is the words he used.

Q. Did you have any conversation at that time with reference to the contract that you had made with Mr. Mills?

A. No, not a thing; that was all; he asked me if he might go ahead with the building.

Q. You just assumed that he knew what Mr. Mills' contract was? [44—30]

A. Yes; I supposed he knew.

Q. Now, I refer to page 1 of the bill of particulars

(Testimony of Emery Valentine.)

where you are charged with \$561.72, 10 per cent commission on sundry accounts. Tell the jury whether or not that is a proper charge against you; and if not, why not.

Mr. SHACKLEFORD.—That is leading and calls for a conclusion of the witness.

The COURT.—Well, as to whether it is a proper charge or not is a conclusion; you may ask him what was said and done about it.

Q. Well, what was said and done, when you made the contract with Mr. Mills, in regard to commission on the sundry accounts?

A. Let me see first for sure what is sundry accounts.

Q. There are the sundry accounts—American Paint Company, \$800; Alaska Electric Light & Power Co., \$550.50; Juneau Iron Works, \$2,972.50; Marshall & Newman, \$1,177.20; Telephone Company, \$117; aggregating \$5,617.20. Just explain that to the jury.

A. Now, what is the question?

Q. Just explain that whole matter to the jury in regard to these sundry accounts—who you object to that charge.

A. These accounts are subcontracts, entered into by me, which I paid for—made the contracts and did the whole thing, and they had nothing whatever to do with this, the company Quackenbush represented; they were fully independent of their work, and independent of them entirely; excepting, according to the agreement there Mr. Mills should do any

(Testimony of Emery Valentine.)

figuring out for the heating plant, the size of the registers and the size of the furnace; he agreed the same with the plumbing, Marshall [45—31] & Newman's bills, and the Telephone Company; they had nothing to do with it one way or the other—never spoke to them at all about it.

Q. Was there anything said between you and Mr. Mill at the time you made the contract that you were going to take care of those yourself.

A. Those are subcontracts. That was mentioned—I said, "Those are subcontracts," and he said, "All right."

Q. Nothing said as to whether he was to have a commission on them or not?

A. No, those were to be independent.

Q. Now, I believe you testified yesterday in regard to the plans for the block?

A. I would like to state first what some of this work is for.

Q. What is it for?

A. Why, the American Paint Company—for instance, some painting and paper-hanging is included in that bill that was done up at my residence; Alaska Electric Light and Power Company, has included in there some fixtures up to my residence, and also my chandelier and fixtures in the store there that I bought, and they had nothing to do with any of those matters at all.

Cross-examination.

Q. Mr. Valentine, I understand you to say the first time you had any conversation with Mr. Quacken-

(Testimony of Emery Valentine.)

bush about this work was at the time Mr. Bush and Mr. Mill had withdrawn from the firm?

A. Oh, no; I didn't say anything of the kind; I said the first time that ever I talked with Quackenbush was when I went down to the office there; it was just at [46—32] the time they were working on the Arctic, started there, and I asked the man about the plate glass in the front and he took out a little book and said that the plate glass would be \$71 a sheet; that is the first words that he ever said to me in connection with this building, whatever, or any other building.

Q. And that was about what time, Mr. Valentine?

A. It must have been somewhere around the latter part of April or the first part of May.

Q. When was it they commenced to work on that block?

A. They commenced work on the block—well, now, I cannot give the date of that, but they were still tearing down, my workmen were, on June 4th.

Q. Did you complete the wrecking of the old building yourself?

A. Yes, sir; took those all down at my expense, and gave them the lot cleared.

Q. Did they do anything with that portion of what is now known as the Valentine block which was already erected?

A. The part that the Gastineau Company had, you mean?

Q. Yes. A. Yes.

Q. What did they do in reference to that?

(Testimony of Emery Valentine.)

A. They lowered that down eight inches.

Q. Had to block it up and then had to saw off the underpinnings or pillars?

A. No, they put in new concrete piers in there.

Q. And let it down on those?

A. Let it down eight inches where it is now.

Q. Had you met Mr. Quackenbush before that—did you know him or were you acquainted with him?

A. Yes, I had met him several times.

Q. Knew he was a member of the firm? [47—33]

A. Oh, yes; when I talked with Mr. Mill—all of my dealing was with Mr. Mill—I said, “I will talk to you entirely about this thing; I won’t talk with any of the other members of the firm; I will do all of my talking to you, and then there will be no chance of a misunderstanding”; he said, “I think that is right,” and there was no second, I never talked with Mr. Bush or Mr. Quackenbush, did all my talking with Mr. Mill.

Q. About what time was it that Mr. Quackenbush called on you and told you the other members of the firm had retired?

A. It must have been some time in July, toward the latter part of July, I think; I am not going to give that definitely as the date, but I think that was it, judging from the time of the Shushanna strike in the interior.

Q. Now, Mr. Valentine, referring to the bill of particulars, your first objection is to 90 pounds of large-head galvanized roofing nails?

A. No, that is not the first.

(Testimony of Emery Valentine.)

Q. What is the first objection?

A. It is on page 1.

Q. What is that?

A. 10 per cent on the sundry accounts, \$561.72.

Q. Your agreement with Mr. Mill, then, was in this condition, that he would start in to build the building, and whatever contract you wanted to let, why, you could let them personally, and there would be no percentage on those contracts?

A. For those things, of course, it was understood between us that this is a separate part from building; builders are the men, as I understand, that buy the lumber and do the carpenter work and so on; that was agreed between [48—34] him and I, that any subcontract that I let wasn't included in the cost of the building that he got his 10 per cent on.

Q. He was to receive 10 per cent on—

A. Whatever was furnished through him or his company.

Q. In other words, if you closed a subcontract, that was excluded from his commission?

A. If I chose to.

Q. Yes.

A. I don't clearly get that; what do you mean by that?

Q. Anything you saw fit to subcontract was not subject to the commission—that is what you want the jury to understand, isn't it?

A. Anything that was handled through the company—for instance, the painting, that would be a subcontract.

(Testimony of Emery Valentine.)

Q. That wasn't in his commission at all?

A. No, not a cent, as it was handled through me; it was what was handled through him or through his company that he got a commission on.

Q. If there was any particular branch of the work that you chose to take up and subcontract, then that would be out of the builder's control and they would not have anything to do with it?

A. It was understood about what we were to do, because I spoke to him to give me the radiation, the number of feet it would require, the size of the furnace, and so forth—

Q. That was in regard to the Forrest contract you had already let? A. No, which he agreed to do.

Q. Had you let all the other sundry contracts?

A. No, we hadn't let any, we let the plumbing afterwards. [49—35]

[**Testimony of George R. Marshall, for Plaintiff.**]

GEORGE R. MARSHALL, being duly sworn for the plaintiff, testified as follows:

Q. Mr. Marshall, you live here in Juneau?

A. Yes, sir.

Q. What are your initials?

A. George R. Marshall.

Q. Did you have a contract in reference to construction upon the Valentine Block in 1913?

A. I did.

Q. How did you get it—were bids asked for?

A. Why, Mr. Mills at that time, he was drawing the plans, I believe, and *he* handed us the plans and the specifications, and we turned in the bids to Mr. Mills.

(Testimony of George R. Marshall.)

Q. Did you go over to Mr. Valentine with your bid, or hand it to Mr. Mill personally?

A. I handed it to Mr. Mills.

Q. Did you have any talk with Mr. Valentine about seeing Mr. Mills?

A. I had talked with Mr. Valentine before that; we were talking over—

Q. How did you happen to go to Mr. Mills with it?

A. Naturally all the plumbers in town knew that building was going up, and Mr. Mills, I think, was drawing the plans at that time.

Q. Who told you he was drawing them—do you remember who sent you to Mr. Mill?

A. Mr. Valentine did.

Mr. SHACKLEFORD.—You may cross-examine.

Cross-examination.

Q. Mr. Valentine sent you to Mr. Mill to see the plans, did he?

A. If I remember right, I was talking to Mr. Valentine [50—36] one time, or my partner, Mr. Newman; and he simply said at that time Mr. Mill had the plans and to go over there; he had the plans and specifications, and we turned the bid in to Mr. Mills.

Q. Who did you make the contract with?

A. We didn't have exactly what you call a drawed-up contract; we have our own sort of bid we turn in.

Q. Who accepted your bid?

A. Why, it was first through Mr. Mill's place we had it, and later Mr. Valentine told me we had it; it seems as if, as I understand it, we was a little higher

(Testimony of George R. Marshall.)

than a party in town here, and we went to Mr. Valentine and asked him, and he told us certainly we had the job, and he was the party who gave us authority to go ahead on it.

Q. Who paid you? A. Mr. Valentine.

Q. As a matter of fact, all that Mr. Mills had to do with it was to show you the plans when you went down there to see them, so you could see what work was to be done, and how it was to be done?

A. He told us that, and laid out the work for us the way he wanted it put in.

Q. And it was done in accordance with the plans and specifications, was it?

A. We had some changes we had to make in accordance with the plans.

Mr. COBB.—That is all.

Redirect Examination.

(By Mr. SHACKLEFORD.)

Q. Did Mr. Quackenbush ever exact any changes in the work as it was laid out? [51—37] A. Yes.

The COURT.—Who did you say laid out the work?

A. I said after we was told to go ahead with the work, Mr. Mill and myself, we went over the building and he give us our lines where we could go ahead and run our stacks through, and laid out our lines for the different rooms.

Mr. COBB.—I didn't catch that.

A. Our vent lines and our stacks, or water soil wastes, as we call them; you see, we had to make some changes up in there; we couldn't run down exactly inside of the wall, so we had to go up overhead.

(Testimony of George F. Forrest.)

Mr. COBB.—For what purpose was those changes made?

A. So we could get our stack down without going through the middle of the room.

Mr COBB.—That had nothing to do with the contract itself, or the work under it, did it?

A. Well, according to the plans it showed going straight down, and according to the way we had to do it we had to change it and alter it a little; according to the plans—

Mr. SHACKLEFORD.—Did that involve any extras?

A. No, we didn't charge no extras on that.

Mr. SHACKLEFORD.—That is all. [52—38]

[Testimony of George F. Forrest, for Plaintiff.]

GEORGE F. FORREST, being duly sworn in behalf of the plaintiff, testified as follows:

Q. Mr. Forrest, you are engaged in business here in Juneau? A. Yes, sir.

Q. What is your business?

A. Why, general machine-shop business.

Q. You were engaged in putting in steam plants in the year 1913 in the town of Juneau?

A. Yes, sir.

Q. Did you put the steam plant into the Valentine block? A. Yes, sir.

Q. Now, I wish you to tell the jury who you dealt with in that matter—just how the thing occurred.

A. Why, as I remember it, the specifications and contract was made out to Mr. Valentine.

Q. Did you go to Mr. Valentine about getting the

(Testimony of George F. Forrest.)

contract? A. Yes, sir.

Q. State what, if anything, occurred.

A. He told me to go to Mr. Mills—that Mr. Mills was handling the building for him.

Q. Did you go to Mr. Mill about it? A. Yes, sir.

Q. Put your bid in to Mr. Mill or to Mr. Valentine?

A. I don't remember who got the bid, whether Mr. Valentine got it or Mr. Mill, but I did put in the bid and the specifications, as I say; that specification, as I remember it, was made out by Mr. Valentine.

Q. But were you instructed by him to go to Mr. Mill for the information necessary in making your bid? A. Yes, sir.

Q. Did he tell you what company had charge of the building? [53—39]

A. Well, now, he didn't say what company—he said Mr. Mill.

Q. That was the time Mr. Mill was with the Juneau Construction Company?

A. He was identified with the Juneau Construction Company at that time.

Mr. SHACKLEFORD.—That's all.

Cross-examination.

(By Mr. COBB.)

Q. In other words, Mr. Forrest, you had to go to Mr. Mill to see the plans? A. Yes, sir.

Q. You say you recognized and dealt, in making that bid, contract, and so forth, with Mr. Valentine?

A. Yes, sir.

Q. Mr. Valentine paid you? A. Yes, sir.

Mr. COBB.—That's all.

Mr. SHACKLEFORD.—You dealt with both parties in the matter? A. Yes, sir.

And the above and foregoing was all the testimony produced by both parties relating to the items of 10 per cent on sundry accounts and $21\frac{1}{2}$ per cent for plans of building, but does not include the testimony relating to the other and remaining items in the Bill of Particulars.

And thereupon the defendant, in writing and before the argument began, requested the Court to instruct the jury as follows:

[Instructions to Jury Requested by Defendant.]

“In arriving at your verdict herein, you will wholly disregard the charge made against Mr. Valentine by the [54—40] plaintiff for \$666.82 for plans of of block. There is no evidence that the plaintiff expended any money or was put to any cost on account of such plans, and the $21\frac{1}{2}$ per cent on the total cost of the building, which the plaintiff claims he was entitled to, to make up such item, is not embraced in the terms of the contract.”

But the Court refused said request, to which ruling of the Court the defendant then and there excepted.

And the defendant before the argument began further requested the Court in writing to instruct the jury as follows:

“You will also disregard the charge made against Mr. Valentine of \$561.72 for 10% on sundry accounts, as that item is not within the terms of the contract as admitted by the plaintiff.”

But the Court refused said request, to which ruling of the Court the defendant then and there excepted.

And thereupon the Court instructed the jury as follows:

[Instructions of Court to Jury.]

“Gentlemen of the Jury:

This is an action brought by the Juneau Construction Company—that is, Mr. Quackenbush—against Mr. Valentine to recover the alleged value of certain materials and labor alleged to have been furnished at his instance and request, and also a certain percentage thereon alleged to have been agreed upon between the parties.

A bill of particulars of the items charged for has been demanded and furnished. Some of the items of the bill of particulars have been admitted by not being denied, and some have been questioned in whole and in part—some of the questioned items have been admitted *in toto*—some [55—41] have been denied *in toto*, and some have been in part admitted and in part denied, so that, even if there were no question of law involved, it would be no easy task to make a summary of the charges and counter-charges, admissions and denials.

There are three buildings figuring in this lawsuit,—

(1) Remodelling of a certain store owned by Mr. Valentine.

(2) The building of the Arctic poolroom.

(3) The building of the structure known as the new Valentine block.

It will be better if you consider these three buildings separately.

It is claimed by plaintiff that, including the commission of ten per cent, the total amount paid out by Quackenbush and to which he was entitled on the remodelling of Valentine's old store is \$520.19, and that what Quackenbush paid out, together with his ten per cent, in the matter of the Arctic poolroom, is \$6355.30. This makes a total of \$6875.49 for those two buildings. You will ascertain from the evidence if that amount is correct, and, if not, what the amount should be.

Now, find out, if possible, what the claim is as to the cost of the new Valentine building,—that is, exclusive of all percentage, plans and "sundry items," and what sum you think the evidence shows.

The plaintiff claims, and has offered evidence to prove, that the value of the materials and labor which entered into the construction of the building (exclusive of all percentage and plans, and exclusive of what is called "sundry items" at the top of page 2 of the bill of particulars) was \$21,186.61. [56—42]

DEDUCTIONS.

Now, as before stated, some of this amount is undisputed—if it were all undisputed you should consider those figures as the true figures of the cost of the new Valentine building.

It was discovered, however, that certain items charged were duplications—that is, they were

charged twice when they should only have been charged once. The amount of the items which were discovered to be duplicate, was \$107.70.

It has also been admitted that the said sum of \$21,186.61 included the following items, which it is admitted did not enter into the construction aforesaid:

Credits given on July statement not on bill	
of particulars	\$ 69.45
Tiling	3.75
Mirrors, Suess Glass Co.....	19.40
Sundry items, page 69.....	4.88
Error, Hanby Bill.....	27.00
Red Rosin Paper.....	16.80
Hauling four loads of gravel.....	4.00
100 feet of hose returned, 1/2 value.....	15.00
124 sacks cement—31 barrels 6 1/5 tons	
@15.00	93.00

Making a total of.....\$360.98

I instruct you as a matter of law, that under the evidence in this case, plaintiff is not entitled to charge as entering into the construction of the building any wages for Mr. Bush, Mr. Mill or Mr. Quackenbush. The amounts charged as the wages of these three gentlemen are as follows: [57—43]

T. F. Bush.....	116.25
R. J. F. Mill.....	30.75
	75.00
	90.00
	74.25
C. A. Quackenbush.....	19.60
	.20 error
	<hr/>
	\$406.05

This makes the grand total of conceded and instructed deductions \$766.83. When these deductions are made, it leaves the plaintiff's claim as to the value of the materials and labor, exclusive of percentage and of the value of the plans, entering into the construction of the Valentine building, and exclusive of the sundry items \$20,419.78.

But the defendant says that the foregoing are not all the deductions which should be made in order to ascertain the true cost of said building. This sum of \$20,419.78 includes items such as cement, glass, lumber, steel, etc., which Valentine claims did not go into the building at all.

Upon the issue as to what went into the building and what did not, the burden of proof is upon the plaintiff to show the correctness of all the charges he has made, and if you find from the evidence that the defendant has been charged with any material not used, you are to allow Mr. Valentine credit for all such material, and calculate the amount thereof at the rate charged for such material in the plaintiff's account.

Now, when said sum of \$20,419.78 has suffered the deductions which the Court has instructed you should be made as a matter of law and those deductions, if any, [58—44] which you think should be made on account of failure of any items charged for to enter into the construction of the building, there will be left a certain sum, the magnitude of which will depend upon the amount of the deductions made. Now that sum will represent the cost of the new Valentine building, exclusive of percentages, plans and sundry items.

The Court further said:

PERCENTAGE.

Now, having determined the cost of the Valentine building, exclusive of percentages, plans and sundry items, you are to add thereto 10% as compensation for superintending as per contract.

Now, plaintiff claims that in addition to 10 per cent on that amount he should also have a commission of 10 per cent on the "sundry items."

Plaintiff claims that the contract was that he should have a commission of 10 per cent upon the total cost of the building; while defendant contends that the contract was that plaintiff was only to have a commission of 10 per cent upon such material and labor as was purchased and furnished by plaintiff, and defendant says that the accounts called "sundry accounts" (which you find on page 2 of the bill of particulars) amounting to \$5,617.20, are materials and labor not furnished by or through the plaintiff, and that plaintiff had nothing to do with them, but

that the defendant transacted that business himself, and that plaintiff is not entitled to any commission thereon. Now, you are the judges as to what this contract was. If you find from a preponderance of the evidence that plaintiff was to have 10 per cent on the total cost of the building, then you will allow him 10 per cent [59—45] on the cost of those materials, labor and so forth furnished by him, and 10 per cent on the value of the “sundry accounts”; but if you find that the contract was that he was only to have ten per cent on such material and labor as was furnished by him, then you must not allow him any percentage on the sundry items. In other words, unless you find from the preponderance of the evidence that the defendant Valentine agreed to pay the Construction Co. 10 per cent upon the bills of the American Paint Co., Alaska Electric Light & Power Co., Juneau Iron Works, Marshal & Newman, and the Telephone Co. (known as “sundry accounts”), you will allow no percentage thereon; that is to say, the question for you to determine is whether or not the contract as made between the plaintiff and the Construction Co. provided for Valentine paying the Construction Co. 10 per cent on these sundry accounts, and upon that issue the burden of the proof is upon the plaintiff.”

To which instruction the defendant then and there excepted, and the Court further instructed the jury as follows:

PLANS.

“Plaintiff claims that in addition to his claim for

material and labor, and for percentage thereon, he is entitled to $2\frac{1}{2}$ per cent on the cost of the new Valentine building for the work and labor of preparing plans for the work of construction. Plaintiff says that defendant agreed that the $2\frac{1}{2}$ per cent was a reasonable sum to charge for the plans, and that it should be so charged, whereas the defendant claims that the contract was to the effect that if plaintiff did not do the work of building he was to have $2\frac{1}{2}$ per cent, but that if he did get the job of superintending the building, he was not to charge anything for the plans. [60—46]

Now, you have heard the evidence on both sides, and it is for you to decide from that evidence what the contract was as to the plans. If you decide that the contract was to pay $2\frac{1}{2}$ per cent of the cost of the building for the plans, then you will compute $2\frac{1}{2}$ per cent on the total cost of the buildings, including the sundry items, and allow that amount also to plaintiff; if you decide that the contract was as Mr. Valentine alleges it to have been, then you will make no addition for or on account of the plans."

To which instruction defendant then and there excepted.

"Now, then, you add whatever you shall have found the other two buildings (together with 10 per cent thereon), *amounted, and* ascertain the difference between that sum and \$26,932.37 (admitted to have been paid), and that difference will be the sum for which your verdict should be.

If that difference is in favor of the plaintiff, your

verdict will be for him for that amount; if that difference be in favor of defendant, your verdict will be for him for that difference."

Filed in the District Court, District of Alaska, First Division. Sep. 20, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [61—47]

**[Order Approving and Allowing Bill of
Exceptions, etc.]**

And because the above and foregoing does not appear of record, I, Robert W. Jennings, the Judge before whom said cause was tried, do hereby approve and allow the foregoing bill of exceptions, and order the same to be filed as a part of the record in said cause. At this time and place, however, the plaintiff appeared and objected to the settlement of said bill of exceptions on the ground that same was not done within the time allowed by law and the rules and orders of this court. In that connection I do further certify that the prior action of this court in the matter of said bill of exceptions is wholly found in the following orders appearing in the journal of said court, to wit:

July 15, 1915: "Upon application of the defendant, good cause therefore being shown.

It is ordered that the time for settling and filing a bill of exceptions herein be and the same is hereby extended to September 1st, 1915."

August 26, 1915: "On oral stipulation, in open court, of W. S. Bayless, Esquire, of counsel for plaintiff, and J. H. Cobb, Esquire, attorney for defendant, it is ordered that the time for settlement of the Bill

of Exceptions herein be, and the same is, hereby extended to October 1, 1915."

September 20, 1915: "On oral motion of William S. Bayless, Esquire, of counsel for plaintiff, and J. H. Cobb, Esquire, attorney for defendant, being present and consenting thereto, the plaintiff is allowed one month from this date in which to propose amendments to defendant's Bill of Exceptions this day filed herein."

October 19, 1915: "Thereupon this Special February, 1915, term of this court is adjourned *sine die*."

Dated this 29th day of December, 1915.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 29, 1915. By J. W. Bell, Clerk.

By —————, Deputy. [62]

In the District Court for Alaska, Division Number One, at Juneau.

#1153-A.

CHARLES A. QUACKENBUSH,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

Petition for Writ of Error.

Emery Valentine, defendant, conceiving himself aggrieved by the final judgment of the Court, in the

above-entitled cause, and having filed his Assignment of Error herein, prays the Court to allow him a Writ of Error from the Honorable the U. S. Circuit Court of Appeals for the Ninth Circuit, and to fix the amount of security which he shall give as a supersedeas to said judgment on such Writ of Error.

• J. H. COBB,

Attorney for Emery Valentine.

WRIT OF ERROR ALLOWED: Supersedeas Bond fixed at Six Thousand Dollars.

Dated this 5th day of June, 1915.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal No. K, page 404.

Filed in the District Court, District of Alaska, First Division. Jun. 5, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [63]

In the District Court for Alaska, Division Number One, at Juneau.

#1153-A.

CHAS. A. QUACKENBUSH,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

Assignment of Errors.

Now comes the defendant and assigns the following errors committed by the trial court during the progress of the trial, and in the rendition of the final

judgment herein, and upon which the defendant will rely in the Appellate Court.

I.

The Court erred in admitting in evidence the testimony of the plaintiff tending to show that the contract between the Juneau Construction Company and the plaintiff provided for a commission of $2\frac{1}{2}\%$ on the cost of the Valentine building "for plans" in addition to the 10% of such costs for the services of the said Company.

II.

The Court erred in admitting in evidence the testimony of the plaintiff tending to show that by the terms of the contract between the Juneau Construction Company and the plaintiff the said company was to be paid 10% on the cost of the "sundry bills" or on the cost of work done by others and with which said Construction Company had no connection.

III.

The Court erred in refusing the prayer of the defendant to instruct the jury as follows:

"In arriving at your verdict herein, you will wholly disregard the charge made against Mr. Valentine by the plaintiff for \$666.82 for plans of block. There is no evidence that the plaintiff expended any money or was put to any cost on account of such plans, and the $2\frac{1}{2}\%$ on the total cost of the building, which the plaintiff claims he was [64] entitled to, to make up such item, is not embraced in the terms of the contract."

IV.

The Court erred in refusing the prayer of the de-

fendant to instruct the jury as follows:

“You will also disregard the charge made against Mr. Valentine of \$561.72 for 10% on sundry accounts, as that item is not within the terms of the contract as admitted by the plaintiff.”

V.

The Court erred in instructig the jury as follows:

“Plaintiff claims that the contract was that he should have a commission of 10% upon the total cost of the building; while defendant contends that the contract was that the plaintiff was only to have a commission of 10% upon such material and labor as was purchased and furnished by plaintiff, and defendant says that the accounts called “sundry items” (which you will find on page 2 of the bill of particulars) amounting to \$5,617.20, are materials and labor not furnished by or through the plaintiff, and that plaintiff had nothing to do with them, but that the defendant transacted that business himself, and that plaintiff is not entitled to any commission thereon. Now you are the judges as to what this contract was. If you find from a preponderance of the evidence that plaintiff was to have 10% on the total cost of the building, then you will allow him 10% on the cost of those materials, labor, etc. furnished by him, and 10% on the value of the “sundry accounts”; but if you find that the contract was that he was only to have ten per cent on such material and labor as was furnished and supervised by him, then you must not allow him any percentage on the “sundry items”—in other words, unless you find from the preponderance of the evidence that the

defendant Valentine agreed to pay the Construction Company 10% upon the bills of the American Paint Co., Alaska Electric Light and Power Co., Juneau Iron Works, Marshall and Newman, and the Telephone Co., [65] (known as "sundry accounts"), you will allow no percentage thereon: That is to say, the question for you to determine is whether or not the contract as made between the plaintiff and the Construction Co. provided for Valentine paying the Construction Co. 10% on these "sundry accounts," and upon that issue the burden of proof is upon the plaintiff."

VI.

The Court erred in instructing the jury as follows:

"Plaintiff claims that in addition to his claim for material and labor, and for percentage thereon, he is entitled to $21\frac{1}{2}\%$ on the cost of the new Valentine building for the work and labor of preparing plans for the work of construction. Plaintiff says that defendant agreed that the $21\frac{1}{2}\%$ was a reasonable sum to charge for the plans, and that it should be so charged, whereas the defendant claims that the contract was to the effect that if plaintiff did not do the work of building he was to have $21\frac{1}{2}\%$ but if he did get the job of superintending the building, he was not to charge anything for the plans.

Now you have heard the evidence on both sides, and it is for you to decide from that evidence what the contract was as to the plans. If you decide that the contract was to pay $21\frac{1}{2}\%$ of the cost of the building for the plans, then you will compute $21\frac{1}{2}\%$ on the total cost of the building, including the "sundry

items'' and allow that amount also to the plaintiff; if you decide that the contract was as Mr. Valentine alleges it to have been, then you will make no addition for or on account of the plans.''

VII.

The Court erred in overruling the motion of the defendant to set aside the verdict, because contrary to and not authorized by the instructions of the Court in this; that the verdict allowed interest from May 1st, 1914. [66]

VIII.

The Court erred in entering judgment on the verdict for interest from May 1st, 1914, because such allowance of interest is contrary to the law of Alaska in an action on mutual account until a balance is struck.

And for said errors and others manifest of record defendant prays that the judgment be reversed and the cause remanded.

J. H. COBB,

Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division. Jun. 5, 1915. J. W. Bell, Clerk.
By John T. Reed, Deputy. [67]

*In the District Court for Alaska, Division Number
One, at Juneau.*

#1153-A.

CHAS. A. QUACKENBUSH,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Judges of
the District Court of Alaska, Division Number
One, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is be-
fore you, wherein, Chas. A. Quackenbush, doing
business as the Juneau Construction Co. is plaintiff
and Emery Valentine is defendant, a manifest error
hath happened to the great damage of the said Emery
Valentine as by his petition doth appear.

We being willing, that error, if any hath happened,
should be duly corrected and speedy justice done to
the parties in that behalf, do command you, if judg-
ment be therein given, that then under your seal,
distinctly and openly, you send the record and pro-
ceedings aforesaid with all things pertaining thereto,
to the United States Circuit Court of Appeals for
the Ninth Circuit, in the city of San Francisco in
the State of California, so that you have the same be-
fore our said Court on or before thirty days from

date hereof, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what if right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, and the seal of the District Court of Alaska, Division Number One, affixed at Juneau this the 7th day of June, 1915. [68]

[District Court Seal.]

J. W. BELL,
Clerk.

By _____,
Deputy.

Allowed:

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division Jun. 7, 1915. J. W. Bell, Clerk. By _____, Deputy. [69]

In the District Court for Alaska, Division Number One, at Juneau.

#1153-A.

CHAS. A. QUACKENBUSH,
Plaintiff,

vs.

EMERY VALENTINE,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Emery Valentine as principal and E. L. Pulver and R. P. Nelson as Sureties, acknowledge ourselves to be indebted and bound to pay to Chas. A. Quackenbush, the above-named plaintiff, the sum of Six Thousand Dollars, lawful money of the United States, for the payment of which sum well and truly to be made, we hereby bind ourselves, our, and each of our heirs, executors, administrators, jointly and severally, firmly by these presents.

The condition of this obligation however, is such that whereas the above-bound Emery Valentine has sued out a writ of error in the above-entitled cause from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in said cause on the —— day of April, 1915.

Now, if the said Emery Valentine shall prosecute his writ of error to effect, and pay all such damages and costs as may be awarded against him if he fail to make his plea good, then this obligation shall be null and void; otherwise to remain in full force and effect.

Witness our hands this the 5th day of June, 1915.

EMERY VALENTINE,

E. L. PULVER,

R. P. NELSON.

Taken and acknowledged before me this the 5th day of June, 1915.

[Notarial Seal]

E. L. COBB,

Notary Public in and for Alaska.

My commission expires Dec. 3d, 1918.

Approved to operate as a supersedeas from the filing thereof.

ROBERT W. JENNINGS,

Judge. [70]

Filed in the District Court, District of Alaska, First Division. Jun. 7, 1915. J. W. Bell, Clerk. By ———, Deputy.

[Endorsed]: No. 1153-A. Chas. A. Quackenbush vs. Emery Valentine. Bond. [71]

[Citation on Writ of Error.]

In the District Court for Alaska, Division Number One, at Juneau.

#1153-A.

CHAS. A. QUACKENBUSH,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

CITATION IN ERROR.

United States of America,—ss.

The President of the United States to Chas. A. Quackenbush, and to Messrs. V. A. Paine, and Shackleford & Bayless, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, State of California, within thirty days from the date of this writ pursuant to a Writ of Error in the clerk's office of the District Court

for Alaska, Division Number One, in a cause wherein Emery Valentine is plaintiff and you defendant in error, then and there to show cause if any there be, why the judgment in said Writ of Error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States this the 7th day of June, 1915.

ROBERT W. JENNINGS,
Judge.

[District Court Seal]

Attest: J. W. BELL,
Clerk.

Service accepted this June 7th, 1915.

SHACKLEFORD & BAYLESS and
V. A. PAINE,

Attys. for Defendant.

Filed in the District Court, District of Alaska,
First Division. Jun. 7, 1915. J. W. Bell, Clerk.
By ————, Deputy. [72]

*In the District Court for Alaska, Division Number
One, at Juneau.*

No. 1153-A.

CHAS. A. QUACKENBUSH,

Plaintiff,

vs.

EMERY VALENTINE,

Defendant.

Praeceptum for Transcript [of Record].

To the Clerk of the District Court, Juneau, Alaska :

You will please make up a transcript of the record in the above-entitled cause, and include therein the following papers to wit :

- 1st. Complaint.
- 2d. Answer.
- 3d. Reply.
- 4th. Judgment.
- 5th. Bill of Exceptions.
- 6th. Petition for Writ of Error.
- 7th. Order Allowing Writ.
- 8th. Assignment of Errors.
- 9th. Writ of Error.
- 10th. Bond.
- 11th. Citation.

Said transcript to be made up in accordance with the rules of the United States Circuit Court of Appeals, for the Ninth Circuit.

J. H. COBB,

Attorney for Emery Valentine.

Filed in the District Court, District of Alaska,
First Division, Feb. 11, 1916. J. W. Bell, Clerk.
By L. E. Spray, Deputy.

**[Certificate of Clerk, U. S. District Court to
Transcript of Record.]**

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

United States of America,
District of Alaska,
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 72 pages of typewritten matter, numbered from 1 to 72, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, as per the praecipe of the plaintiff in error, on file herein and made a part hereof, in the cause wherein Emery Valentine is plaintiff in error and Charles A. Quackenbush, doing business under the firm name and style of the Juneau Construction Company, is defendant in error, No. 1153-A, as the same appears of record and on file in my office, and that the said record is by virtue of the Writ of Error and Citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and the cost of preparation, examination, and certificate, amounting to \$31.65 has been paid to me by counsel for plaintiff in error.

In Witness Whereof I have hereunto set my hand and the seal of the above-entitled court this 14th day of February, 1916.

[Seal]

J. W. BELL,
Clerk of the District Court for the District of Alaska,
First Division.

[Endorsed]: No. 2752. United States Circuit Court of Appeals for the Ninth Circuit. Emery Valentine, Plaintiff in Error, vs. Charles A. Quackenbush, Doing Business Under the Firm Name and Style of the Juneau Construction Company, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed February 29, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.